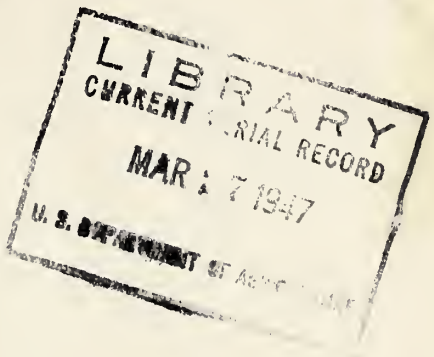
UNITED STATES DEPARTMENT OF AGRICULTURE
FARM CREDIT ADMINISTRATION
WASHINGTON 25, D. C.



SUMMARY OF CASES

RELATING TO

FARMERS' COOPERATIVE ASSOCIATIONS

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Summary No. 33 March 1947

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Bylaw Upheld Requiring Redemption of Stock

In the case of Farmers Union Co-op Gin Co. v. Taylor, ___ Okla. ___, 172 P.2d 775, it appeared that:

> "It was the mutual understanding of the organizers that the by-laws of the corporation should and would provide that any stockholders on removing from the trade territory of the defendant would be entitled to a redemption at par of the stock then held by him. And as an inducement to subscribers the proposed by-laws were exhibited to them and subscriptions made in reliance thereon. The by-laws were adopted at the first meeting of the stockholders and since have continued in force. Section 8 of the by-laws on which plaintiff relies is as follows:
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> "'Section 8. The Corporation shall redeem at par the stock of any such member when that member sells his farming interest in and moves his residence out of the trade territory of this corporation.'" (Underscoring added.)

The plaintiff in the court below was the owner of two shares of stock in the cooperative gin and he -

> ". . . sold his farming interests that lay within the trade territory of defendant, moved therefrom, and made demand upon defendant to redeem his shares of stock. Defendant refused to redeem and the present action followed.
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> * * * * * * *
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> "It is admitted by the defendant that the sole question here is whether the by-law whereby the corporation agreed to purchase the stock of one leaving the trade territory is an enforcible provision or one against public policy and void. And as the basis for the contention that it is void it is urged that the by-law is violative of Tit. 18 O.S. 1941 § 106, which is as follows:
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> "'The directors of corporations must not make dividends except from the surplus profit arising from the business thereof, nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase their capital stock, except as specially provided by law. For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen), are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock sodivided, withdrawn, paid out,

or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such directors for any sums for which they are made liable by this section. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution or the expiration of its term of existence.'" (Underscoring added.)

As pointed out above, the issue in this case was whether the retirement of stock of the cooperative association was controlled by the statutory provision quoted above, which was applicable to corporations incorporated under the General Corporation Act of Oklahoma. In holding that the statutory provision was not applicable to the retirement of stock by the cooperative association, the court said:

"Independently of statutory authority therefor, it is generally recognized that a corporation has power, in the absence of constitutional, statutory or charter restrictions, to purchase its own stock where acting in good faith and the rights of creditors and nonassenting stockholders are not adversely affected. 14A C.J. 275, sec. 2124, and cases cited, 19 C.J.S. Corporations, § 950. It was so recognized by this court in Western & Southern Fire Ins. Co. v. Murphey, 56 Okl. 702, 156 P. 885, where there is quoted with approval the following from Allen v. Francisco Sugar Co. et al, 193 F. 825, 114 C. C. A. 453 [56 Okl. 702, 156 P. 890]:

"'A corporation, in the absence of constitutional or statutory prohibition, has in general an inherent right, for a bona fide purpose, to retire its capital stock by purchase.'

"And also pertinent here is the following which we there quoted with approval from Southern Exp. Co. v. Western N.C.R.Co., 99 U.S. 199, 25 L.Ed. 319:

"'The contract of a corporation is presumed to be infra vires, until the contrary is made to appear.'

"It follows, in the instant case, that the question whether the contract is violative of the quoted statute could only arise after it clearly appears that the statute has applicable force.

"The section of the statute quoted above which has been in force in this jurisdiction since statehood is part of the general law and applicable to corporations created thereunder or coming within the scope thereof, which corporations, generally speaking, are organized for profit. The defendant corporation was organized under a different law which is applicable solely to co-operative corporations and to the extent it is complete in itself there is no warrant to invoke provisions of the general law.

"The portion of the statute which is said to be violated by the by-law is the inhibition against reducing or paying to stockholders

any part of the capital stock. If such provision stood apart from the remainder of the section and was not inconsistent with the purpose of the co-operative law and not covered therein there would be afforded an apparent basis for the contention. But neither situation exists.

"The quoted statute deals with the duties and liabilities of the directors with respect to three things, the matter of dividends, the matter of withdrawing or reducing the capital stock and the matter of the indebtedness, and the liability imposed by the statute applies with equal force to a violation of any of the duties so defined.

"Under the co-operative statutes the matter of apportionment of earnings to reserve fund, dividends and otherwise is specifically declared by 18 O.S. 1941 § 432 and the question of liability for violation is specifically provided for in 18 O.S. 1941 § 433, as follows:

"'If the Directors of such Corporation shall declare and pay any dividend or apportionment of earnings, or profits to members or non-members when the Corporation is insolvent or when it would be rendered insolvent by such payment, such directors shall be jointly and severally liable * * *.'

"The matter of the liability of directors for excessive indebtedness (which under sec. 106 was the amount in excess of subscribed capital) is specifically declared in 18 O.S. 1941 § 431, as follows:

"'If the indebtedness of such corporation shall at any time exceed the amount of its subscribed capital stock and surplus the directors assenting thereto shall be personally and individually liable for such excess to creditors. Except any indebtedness created in favor of the State warehouse revolving fund.'

"The fact that the Legislature in dealing with a subject matter corresponding to that of the quoted section, to-wit: the liabilities of directors, should adopt and conform two of the bases expressed in the general statute and ignore a third, which would be equally important if appropriate to the new law, is strong evidence that it was purposely omitted because its inclusion would be inconsistent with the purpose to be accomplished through the co-operative law. And that such purpose contemplated a power with reference to transfer of stock not accorded to general corporations where such statute obtains is reflected in subdivison (6) of section 425, dealing with powers, as follows:

"'To make by-laws not inconsistent with law for the management of its property, the regulation of its business and the transfer of its stock.'

"It is clear that the provisions of section 106, quoted above, are not applicable to the defendant.

"Apart from the fact the statute has no such application, it is manifest the provisions thereof relied on if held applicable would conflict with a course of conduct that is deemed necessary to the accomplishment of the purpose of the co-operative. Upon this question it is stated in Cooperatives, Organization and Operation, by Packel (1940):

"'The important feature of the personal character of the ownership interest in a cooperative is also manifested by the principles applicable to the transfer of such interests. As already pointed out, in the ordinary corporation the holder of shares has an unconditional right of selling those shares. Restraints on that right of alienation are the exception and have been upheld only in certain cases where the courts thought the restraints were reasonable in character and in purpose. In the ordinary cooperative, however, the right to transfer the shares is almost always limited. The limitation usually requires the shares to be offered to the cooperative at par or cost prior to any sale. A restraint on the transfer of shares of a cooperative is valid since it enables the cooperative to keep out of its membership undesirable persons, which is an important requirement for the success of a cooperative.'

"In Carpenter v. Dummit, 221 Ky. 67, 297 S.W. 695, 699, it is said:

"'* * * to permit the sale of its stock to persons not interested in co-operative marketing and possibly unfriendly thereto, would render it possible to defeat the very purpose which it was organized to accomplish.'

"The provision for purchase of its own stock is recognized as proper method in the accomplishment of the purposes of cooperative corporations. In 16 Fletcher Cyclopedia Corporations, sec. 8286, p. 1205, it is said:

"'The enabling statutes universally limit membership to growers or producers of the particular product or persons connected with the growing, producing or handling of such product as specified therein, and an association may limit the transfer of memberships to growers of the particular product which it handles. It may also provide for the repurchase of shares of a member or stockholder who dies or removes from the locality served by the association.'

"See also Lindsay v. Arlington Co-operative Ass'n, 186 Mass. 371, 71 N.E. 797; Loch v. Paola Farmers' Union Co-op. Creamery and Store Ass'n, 130 Kan. 136, 285 P. 523; Whitney v. Farmers' Co-op. Grain Co., 110 Neb. 157, 193 N.W.103; Stuttgart Co-operative Buyers Ass'n v. Louisiana Oil Refining Corp., 194 Ark. 779, 109 S.W.2d 682."
(Underscoring added.)

This is one of the few cases involving the question of whether statutory provisions applicable to corporations formed under the general corporation

laws of a State are also applicable to cooperative associations formed under cooperative acts.

Cases like the instant one support the principle that a cooperative association may revolve its capital. See in this connection "Revolving Fund Plan of Financing," page 276 of "Legal Phases of Cooperative Associations."

Haulers --Independent Contractors --Not Employees

In the case of Steve Rogers v. Poteet, et al., ___ Mo. ___, ___ S.W. ___, recently decided by the Supreme Court of Missouri, that court affirmed with some modifications a decree entered by the lower court perpetually enjoining the defendants below "from hindering, interfering with or preventing in any respect whatsoever, the receipt, unloading and processing of any milk brought to the Borden Dairy Company in Kansas City, Jackson County, Missouri by the plaintiff-respondent, Steve Rogers, his agents, employees or representatives."

> "The defendants-appellants are members of a labor union which has unionized the Borden Dairy Company plant (and others) in Kansas City. Pursuant to a union plan the appellants refused to unload milk delivered to that plant by respondent Rogers for himself and others, because he was not a member of their union. He thereupon brought this suit on the theory that appellants were violating our conspiracy statute, Sec. 8301; and that he was an independent contract hauler of the milk and not subject to being unionized. Appellants challenge the sufficiency of the petition, evidence, and decree. They deny that they are conspirators; and contend respondent Rogers is not an independent contractor, but works under the control of the Pure Milk Producers Association of Greater Kansas City, hereinafter called the Producers Association, a non-profit co-operative corporation organized under Sec. 14435 et seq.; and that a bona fide labor dispute exists. Both parties invoke constitutional law." (Underscoring added.)

The statutory provision of the law of Missouri under which the injunction was granted and upheld reads as follows:

> "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article, or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article."

The plaintiff in the court below was an independent contractor and not an employee. When he attempted to deliver milk which he had collected on his route to the plant at which it was processed, the union employees of the plant refused to handle his milk and a considerable loss to the

producers of the milk was thus caused. The union men against whom the injunction was issued of course contended that they were acting within their rights in refusing to handle milk delivered by a nonmember of the union. The court in affirming the action of the trial court said in part:

"Appellants also rely on several decisions of the United States Supreme Court and one other Federal decision upholding the right of union labor to strike and engage in peaceful picketing as a matter of personal liberty, free speech and assemblage under the First and Sec. 1 of the Fourteenth Amendments, which cover the same ground as Sec's 8, 9 and 10, Art.1, Constitution of Missouri, 1945. They argue that their refusal to handle for their own employers the milk brought to the processing plants by non-union haulers, and respondent in particular, was a means of persuasion and came within the constitutional right of free speech. Specifically, they invoke the Stapleton case just cited below, and that decision did hold unconstitutional Sec. 12 of the Kansas Session Laws, 1943, C.191, which forbid any person, as the opinion states, 'to refuse to handle, install, use, or work on particular materials or equipment and supplies because not produced, processed, or delivered by members of a labor organization.' It appears from Shepard's U.S. Supreme Court Citations that an appeal in the Stapleton case dismissed on November 13, 1945, by stipulation, costs to be equally divided.

"As we read the Stapleton opinion, the holding therein is not based on the right of free speech, but on the personal right 'to choose the terms and conditions under which one will work, like' the right of free speech, which is the language of the opinion. Undoubtedly unionized employees would have the right to quit work or to refuse to accept employment because of undesirable conditions, or for any other reason, even an unworthy one (absent a contract to the contrary). Hunt v. Crummach, 325 U.S. 821, 89 L.Ed. 1954, 64 S.Ct. 1545. But, if, for instance, in this case they had conspired with their own employer to restrain competition in the interstate marketing of milk they would have been liable under the Sherman Anti-Trust Act, even though they acted in furtherance of their own interests; whereas, if they merely confederated with each other for a like purpose they would not be liable under that Act. Allen Bradley Co. v. Local Union No. 3, etc., 325 U.S. 797, 89 L.Ed. 1939, 65 S.Ct. 1545.

"This shows labor conspiracies in some circumstances are still under the ban of Sherman Anti-Trust Act. In other words, outside of the fundamental guarantees in the Bill of Rights in the Federal and State Constitutions, the question of the legality of such combinations is one of statutory law, not constitutional law. And the right to boycott for coercive purposes is not one of those fundamental rights, so far as we are aware. The history of the Federal legislation on this general subject is reviewed in the Allen Bradley case last cited above, beginning with the Sherman Anti-Trust Act, originally enacted in 1890, and followed by the Clayton Act, originally enacted in October, 1914; the Norris-LaGuardia Act, enacted in

March, 1932; and the Wagner National Labor Relations Act, enacted in July, 1935."

The court further said:

"We hold the respondent was an independent contractor under our state law. Neither the producers on the milk route nor the Producers Association had or claimed any right to control over the details of work or his physical conduct. He could and did hire his own assistants. The fact that the Producers Association could determine the destination of the milk, and could change the routes, and that the producers' contracts with the haulers were made subject to the former's contracts with the Association, did not create a relation of master and servant.

"And in our opinion he was not an employee but an agricultural laborer within the meaning of Sec. 152(3) of the National Labor Relations Act. If the Producers Association had hired the haulers as servants directly or indirectly for commercial or manufacturing purposes, or processing connected therewith, it seems they would have been 'employees', though dealing with farm products. But the holdings are the other way where the work is a part of the production of an agricultural commodity, as was conceded in the Edinburg and North Whittier cases just cited, and was held in two others. It has been expressly ruled that workers on a dairy farm processing and delivering milk are agricultural laborers under the Unemployment Compensation Act of the State of Washington, State v. Christensen, 18 Wash.(2d) 7, 137 Pac. (2d) 512, 146 A.L.R. 1302. And this court has held 'agricultural labor' includes the horticultural labor of a florist in growing flowers, under our Compensation Act. St. Louis Rose Co. v. Unemployment Comp. Commission, 348 Mo. 1153, 159 S.W. (2d) 249."

The appellate court directed that the decree of the lower court should be redrafted so as to assure the appellants of their "constitutional right by peaceful picketing and persuasion and means not involving violence, intimidation and coercion to advocate the cause of their Union and thereby advance their own interests."

The case of Columbia River Packers Association v. Hinton, 315 U.S. 143, is the leading Supreme Court case on the question of a "union" of independent contractors, and it of course held that the fishermen who were functioning as independent operators could not form a labor union and have the rights and privileges of a labor union.

In the case of National Labor Relations Board v. Hearst Publications, Inc., 322 U.S.111, the Supreme Court held that the newsboys involved in that action came within the scope of the National Labor Relations Act, although apparently it was conceded that the technical relation of master and servant did not exist with respect to them.

The case of Ring v. Spina, 148 F.2d 647, involved the Dramatists' Guild of the Authors' League of America, Inc. It was a suit for treble damages

under the Sherman Anti-Trust Act. The defendants attempted to defend by claiming that the Dramatists' Guild of the Authors' League of America, Inc., was a labor union and as such entitled to the exemptions from the antitrust acts prescribed for labor unions, but the court was clearly of the opinion that the members of the Guild were not employees and that the Guild was not technically a labor union and hence that the organization did not come within the exceptions to the antitrust acts. A similar conclusion was reached relative to physicians and their organization in the antitrust case of American Medical Association v. United States, 317 U.S. 519.

For a discussion of the question of whether independent contractors have a status analogous to that of employees, and for cases bearing upon this question see Labor Law - Contract Requiring Employer Not to Deal with "Independent Businessmen" Unless They Join Union of Employees Doing Similar Work, 40 Col. L.R. 1439; Determination of Employer-Employee Relationship in Social Legislation, 41 Col. L.R. 1015; Labor-Trade Regulation - Application of Sherman Act to Entrepreneurs in a Position Similar to Laborers, 42 Col. L.R. 702.

Officers Family Corporation Denied Preference

In the recent case of Pure Milk Association, et al. v. Lee D. Bort, Receiver of Merrick Dairy Co., ___Wis. ___, ___N.W.___, it appeared that the Merrick Dairy Company made an assignment for the benefit of its creditors and that its assets were insufficient to pay all general claims in full.

A Statute of Wisconsin reading in part as follows provided for a preference in favor of those who had delivered milk, cream, or any other dairy product to the owner or operator of any dairy plant:

> "The whole claim of any person against the owner or operator of any dairy plant . . . on account of milk, cream or any other dairy product . . . sold or delivered to such owner, operator . . . shall be entitled to the same preference in insolvency proceedings as is given by any law of this state . . . to claims for labor . . ." (Sec. 100.06(8) Stat. 1945.)

The trial court allowed the Pure Milk Association, a cooperative marketing association organized under the law of Illinois, and which acted as the agent and guarantor of its members, a preference to the extent of $600 and treated the balance of its claim, amounting to $8,394.17, as a general claim. In holding that the Pure Milk Association was entitled to a preference with respect to its entire claim the court said:

> "Distribution out of the debtor's estate goes first for preserving the estate, subsequent to the commencement of the proceedings, then for costs of administration and then to labor for wages, not exceeding $600.00 for each labor claim and earned within three months

before the commencement of the proceedings, together with the amount due producers of dairy products. The trial court was of the opinion that the words, 'whole claim', as used in the statute were modified into a limitation by the words, 'entitled to the same preference in insolvency proceedings as is given by any law of this state . . . to claims for labor.' In his decision he limited amounts of preference to $600.00 and deliveries made within three months.

"Before considering the meaning and purpose of sec. 100.06(8) as it may affect claims for dairy products, and because the deliveries were made within three months and each claim is for less than $600.00, it should be noted that by virtue of the merits of the claims presented by the Pure Milk Association the limitation phase of the question does not necessarily arise. This is because its agreement with its members was in the nature of a contract of agency. Although respondent recognizes this and the fact that preference goes with the assignment of a preferred claim, the contention is made that the Pure Milk Association did not enter its claim as the assignee of the claims of the forty-one individual milk producers involved, but that instead the association filed its claim for a single aggregate sum and in so doing placed the basis for the determination of preference in its own individual right and not in its right as an assignee. Since under sec. 100.06(8) the whole claim is within the preference it will make but little difference as to the ground upon which the claim is allowed. However, while the claim is filed for an aggregate sum, it was filed by Pure Milk Association as the agent of its members and the names, addresses and accounts of those members with the times of delivery were submitted as part of the proof of claim, and their accuracy conceded. The Pure Milk Association in fact is the assignee of the forty-one milk producers. Each of such claims is entitled to preference. The association did not waive any of its rights or become barred because for convenience it chose to set the individual claims forth in one claim.

"Now, with reference to the interpretation of sec. 100.06(8): the words of our statute are explicit. Their natural import and their literal sense clearly indicate an intention to place the claim of the producers of dairy products, in circumstances such as exist here, in the same bracket with and on the same level of preference as is given labor claims. This advantage or this rank places labor and dairy producers' claims immediately after costs of administration. Sec. 128.17 Stats. 1945. They are fixed in this category and so stand in the course of distribution. Judicial decisions construing or applying similar statutes are few but such as we have found sustain this interpretation. Pyrites Co., Inc., v. Davison Chemical Co. (1933), 4 F. Supp. 294 and In re: Charles Nelson et al.(1939), 29 F. Supp. 56."

It appeared that the Merrick Dairy Company was a corporation run by the three Merrick brothers. In other words, the corporation was apparently a family corporation. The claims of the three brothers against the

Merrick Dairy Company were for salaries. The trial court refused to hold that the three brothers were entitled to preferences for the amount of unpaid salaries. In affirming the decision of the trial court in denying such preferences, the court said:

"As to the claims of Roy L. Merrick, Earl Merrick, and Fay L. Merrick, it appears in the statement of facts that the trial court allowed them as general claims but subordinated them to the claims of other creditors. These appellants maintain that this determination is erroneous. It is true that there seems to be no serious controversy as to the amount of the claims or that there was a want of good faith. While these claims are not held to be fictitious or based on fraud of a willful character, still the weight of authority supports the rule that claims of dominant stockholders who manage a business, and engage in an interchange among three business enterprises controlled by them for the purpose of keeping the business going, may be subordinated to the claims of other general creditors. Boyum v. Johnson (1942), 127 Fed.(2d) 491. Facts considered in Pepper v. Litton (1939), 308 U.S. 295, differ decidely from those now before us. Still that case is authority for the ruling made by the court below. In the Pepper case, after stating that a director or controlling group of stockholders is a fiduciary whose powers are powers in trust, the court says:

> 'Thus, salary claims of officers, directors and stockholders in the bankruptcy of "one-man" or family corporations have been disallowed or subordinated where the courts have been satisfied that allowance of the claims would not be fair or equitable to other creditors. And that result may be reached . . . where the claim asserted is void or voidable because the vote of the interested director or stockholder helped bring it into being . . . And so-called loans or advances by the dominant or controlling stockholder will be subordinated to claims of other creditors and thus treated in effect as capital contributions by the stockholder. . .
>
> '. . . He who is in such a fiduciary position cannot serve himself first and his cestuis second . . . He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis.'

"From the record it appears that the salaries of the three Merrick Brothers were set up by formal action of the Board of Directors, of which the three brothers were themselves the only members. These salaries were apparently fixed at a higher amount than the business of the corporation would justify. Balances were left in their salary accounts in order to meet the corporate obligations.

In view of facts dealt with by the trial court and in view of the law concerning fiduciaries and their position in bankruptcy proceedings, great consideration should be given to the findings of the trial judge. The practically private ownership of the insolvent concern and the constant interchange of transactions between the corporation and the private enterprises of the owners of all of the common stock in the insolvent corporation linked the fate of the private enterprises, although in different communities and therefore acting under different conditions, with that of the insolvent corporation. Even though we might have reached different conclusions we are not justified in setting aside the findings made below, and as to the subordinating of these claims to those of other general creditors the order is affirmed." (Underscoring added.)

Agricultural Labor -- Definition Broadened

In the Internal Revenue Bulletin of December 30, 1946, No. 26, after reviewing the cases of Jones v. Gaylord Guernsey Farms, et al., 128 F.2d 1008; Hansen, et al. v. Squire, decided December 18, 1945, by the United States District Court for the Western District of Washington; Larson v. Ives Dairy Co., Inc., 154 F.2d 701; and Chester C. Fosgate Co. v. United States, 125 F.2d 775, Joseph D. Nunan, Commissioner of the Bureau of Internal Revenue, makes the following statement:

"Since the trend of judicial opinion in the foregoing cases is contrary to the position of the Bureau, it appears necessary to formulate a new policy looking to a broader interpretation of the law and regulations with respect to the classification of services performed in the operation of dairy farms. For this purpose the following action is taken and the following rules are prescribed:

"(A) S.S.T. 158 and S.S.T. 357 are hereby revoked.

"(B) The principles set forth in S.S.T. 125 are modified in so far as they relate to the classification of services performed prior to January 1, 1940, in the employ of dairy farmers, to the extent necessary to conform to the policy herein set forth.

"(C) The question whether the farm products are sold exclusively at wholesale will be disregarded as a factor in determining whether the processing or packing, etc., of such products is carried on as an incident to ordinary farming operations.

"(D) The 'agricultural labor' exception will extend generally to services performed in the employ of the owner or tenant or other operator of a dairy farm in preparing for and delivering to market in their unmanufactured state (see, however, exception in paragraph (F) below) commodities produced on such farm.

"(E) No change will be made in the established position of regarding as 'agricultural labor' those services performed on a dairy farm in

connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, feeding, caring for, training, and management of livestock.

"(F) Paragraphs (2) of sections 1426(h) and 1607(l) of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, respectively, in force on and after January 1, 1940, include as 'agricultural labor' services performed in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, if the major part of such service is performed on a farm. This will include those services necessary for the operation, management, conservation, improvement, or maintenance for the dairy farm operations and for the pasteurizing, bottling, processing, packing, packaging, transporting, and delivery of milk and cream or other dairy products, such as cottage cheese or butter, which do not require extensive processing or manufacturing operations.

"(G) The term 'agricultural labor' also will include incidental services of employees engaged in the delivery of dairy products which are performed concurrently with their delivery duties, such as the collection of accounts.

"(H) The provisions of paragraphs (2) of sections 1426(h) and 1607(l) of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, respectively, will be applied in determining whether clerical services performed after December 31, 1939, in the employ of dairy farm operators constitute 'agricultural labor.' In accordance with the decisions in the above-cited cases, all clerical services performed prior to January 1, 1940, in the employ of dairy farm operators constitute 'employment.'

"Pursuant to the provisions of sections 1426(c) and 1607(d) of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, respectively, if the services performed after December 31, 1939, during one-half or more of any pay period by an employee for the person employing him constitute 'employment,' all the services of such employee for such period shall be deemed to be 'employment'; but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute 'employment,' then none of the services of such employee for such pay period shall be deemed to be employment. As used in this paragraph the term 'pay period' means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the employee by the person employing him.

"Correspondence relating to this mimeograph should refer to its number and to the symbols EmT:RR." (Underscoring added.)

Agency -- No Gross Income Taxes

In the case of Department of Treasury v. Ice Service, Inc., ___ Ind. App.___, 41 N.E. 201, the sole question presented was whether Ice Service, Inc., a cooperative organization organized by four companies engaged in the manufacture of ice, was liable for gross income taxes on sales of ice which it had made, which ice was received from the four manufacturing companies.

Ice Service, Inc., had paid gross income taxes amounting to $7,433.36 during the years 1933 to 1936. It filed a suit for the recovery of these taxes and the trial court held that it was entitled to recover the same. An appeal was then taken by the Department of Treasury of Indiana to the Supreme Court of that State, and on appeal the Supreme Court said:

> "The sole question presented by this appeal is the question as to whether the amounts, on which the tax in question was paid, were received by the appellee as an agent.
>
> "The evidence discloses that the appellee was organized as a corporation under the laws of the State of Indiana, on May 22, 1930, by four companies which were then engaged in the business of manufacturing, selling and distributing ice in Vanderburgh County, Indiana. These four companies entered into a verbal agreement by the terms of which it was agreed that the appellee company should thereafter sell and distribute the ice manufactured by the four manufacturing companies. Pursuant to the agreement an audit was made of the business done by the four companies during the years 1927 and 1928, and it was thereby determined what proportion of the total business of the four companies each company had done during those two years. It was agreed that each of the four manufacturing companies should annually furnish to the appellee company ice for sale in the same proportion its sales during the two years bore to the total sales of the four companies for that period; and that each company should share in the distribution of the proceeds from the sale of ice by the appellee in the same proportion.
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> "Each of the manufacturing companies, on the organization of the appellee company subscribed for stock in, and furnished capital to, the appellee company. The operating expense of the appellee company, in the sale and distribution of the ice, was deducted from the gross receipts from the sale of the ice and the balance of the proceeds then distributed proportionately as above indicated to the four manufacturing companies. Each of the manufacturing companies carried on its books the gross receipts from the appellee from the sale of its (the manufacturing company's) proportionate share of the ice sold by the appellee and also carried on its books, as an expense of its business, its proportionate share of the sales and distribution costs of the appellee company. The appellee carried the proceeds from the sale of ice on its books in the same manner.
>
> "Each of the manufacturing companies paid gross income tax on its proportionate share of the total amount received from the sale of

ice by the appellee without deduction of the expense of the sale and distribution of said ice. Such gross income taxes paid by the manufacturing companies were at the proper rate for each company's proportionate share of the wholesale and retail sales made by the appellee company.

"The appellee company, in addition to the sale of ice, was also engaged in the sale of refrigerators, but on the receipts from these sales the appellee company does not question its liability to pay gross income tax. The record contains evidence to sustain a finding of all of the above facts.

"[1] 'Agency' has been defined by the American Law Institute as follows: 'Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.' Restatement of the Law of Agency, § 1.

"[2] The agency relationship arises from the consent of the parties, out of a contractual agreement between the parties, but it is not necessary that the contract or the authority of the agent to act be in writing.

"[3] The question of whether the agency exists is ordinarily a question of fact which may be established as any other fact, either by direct or by circumstantial evidence. Jasper County Farms Company v. Holden, 1923, 79 Ind. App. 214, 137 N.E. 618.

"[4] The creation of the relationship depends upon the intention of the parties. The principal must intend the appointment of the agent and the agent must intend to accept the appointment and act upon it. 2 C.J.S., Agency, § 17, p. 1041.

"[5] In the instant case the appellant does not contend that the manufacturing companies could not have appointed the appellee corporation as a sales and distribution agency for the four manufacturing companies, but contends that there is no evidence to support the finding of the court that such agency existed. To support its contention the appellant points out that the appellee made federal net income tax returns in which it reported receipts from the sale of ice under the item 'Cost of Goods Sold' and similar amounts under the item 'Material or Merchandise Bought for Manufacture or Sale'. The appellant insists that this fact shows conclusively that the appellee believed it was buying the ice from the ice manufacturers and was selling it for its own account and not as agent. At the most this fact amounts only to evidence tending to support the contention of the appellant, but in determining the sufficiency of the evidence to sustain the finding of the trial court we look only to the evidence most favorable to the appellee and do not weigh conflicting evidence. Anderson v. Knotts, 1913, 181 Ind. 434, 104 N.E. 754, Ann.Cas.1916D, 868; Cleveland, C., C. & I. R. Co. v. Wynant, 1893, 134 Ind. 681, 34 N.E. 569.

"The appellant also insists that by the following facts: That the ice of the four manufacturing companies was commingled; that at times one of the manufacturing companies would temporarily shut down its plant and during such shut-down would furnish no ice to the pool; that the appellee did not account to each of the manufacturing companies for proceeds of the sale of the particular ice furnished by such manufacturing company, but only distributed the proceeds on the basis of the proportionate share of the ice furnished by the four companies, it is shown conclusively that the ice was not sold by the appellee as the agent of the four companies. We can not agree with the appellant on this contention. We see no reason why the four companies and the appellee could not agree that the ice manufactured by the four manufacturing companies should be furnished by said four companies annually proportionately to the business each had done during the years covered by the audit, nor why the ice so furnished should not be commingled in a general pool, sold from such general pool by the agent and the proceeds accounted for by the agent, periodically, on the basis of the proportion of the ice furnished by each of the four manufacturing companies. It was not necessary that the ice of the four companies be kept separate or that the proceeds of each sale made by the appellee be accounted for to the company which furnished the ice for that particular sale. Nor do we see any reason why the parties among themselves could not have agreed, as they apparently did, that the proportion of the ice to be furnished by each of the companies was to be figured on an annual basis. If this was proper then it was not essential that each company furnish its proportionate share of the ice each day, each week, or each month.

"In cooperative marketing agreements we find many examples of this type of agency which have been upheld by the courts. In Burley Tobacco Society v. Gillaspy, 1912, 51 Ind.App. 583, 100 N.E. 89, 90, appellant, a corporation organized under the laws of the State of Kentucky, entered into a written contract with appellee and other growers of the Burley tobacco in this State, whereby appellant was named 'as sole agents for the purpose of receiving, commingling, handling, warehousing, inspecting, insuring, grading, financing and selling all of the said tobacco grown by each of the growers.' The court recognized this contract as a valid agency agreement between the parties thereto.

"[6] In the application of the principles to determine whether an agency has in fact been created, it is generally held that cooperative marketing contracts create between the members and the association the relation of principal and agent. 2 Am.Jur. § 24, p. 27; Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 1933, 122 Tex. 464, 61 S.W.2d 79; Spencer Co-op. Live Stock Shipping Ass'n v. Schultz, 1932, 209 Wis. 344, 245 N.W. 99; Mountain States Beet Growers' Marketing Ass'n v. Monroe, 1928, 84 Colo. 300, 269 P. 886; Haarparinne v. Butter Hill Fruit Growers Ass'n, 1922 Me. 138, 119 A. 116. In the latter case in a suit by an association member to recover from the association for the price of apples, part of which were frozen before delivery to the association, it was held that

because the contract between them created only an agency, and did not amount to a sale of the apples, the member could not recover from the association.

"In City of Owensboro v. Dark Tobacco Growers Association, 1927, 222 Ky. 164, 300 S.W. 350, 351, the appellant city assessed for taxation $350,000 worth of tobacco in the warehouses of the appellee association. The appellee association contended that the tobacco was exempt from taxation under the provisions of a statute exempting 'unmanufactured agricultural products in the hands of the producer or in the hands of any agent or agency of the producer to which said products have been conveyed or assigned for the purpose of sale by the producers'. The court there stated as one of the questions necessary for decision, 'Is the Tobacco Growers Marketing Agreement a contract of sale to the association, or is it merely a contract of agency?' There the cooperative agreement said that 'the association agrees to buy and the grower agrees to sell and deliver to it all the tobacco produced by or for him or acquired by him during' a specified period. In deciding, in spite of this language, that the agreement created an agency relation between the parties, the court said:

"'In determining whether an agreement between parties is a sale or whether it is a mere contract of agency, isolated expressions in the instument indicating whether it is one or the other are not necessarily controlling; on the contrary the courts will ignore apparently inconsistent language used, and look to the real nature of the agreement between the parties, what its real purpose was, and what, from the nature of the transaction, must have been in the minds of the parties. * * *

"'The whole conception of the organization was that it was a marketing association created and organized for the purpose of advantageous marketing of the growers' product, not for the benefit of the association, but for the benefit of its members, who were all either growers or landlords.

"'A consideration of these facts makes it impossible that the parties could have had in mind any other thing than the creating of a sales agency in the execution of the several contracts.'

"[7] So, in the instant case, we find no difficulty in saying that the evidence was sufficient to support the finding of the trial court that the four manufacturing companies in organizing the appellee corporation and in agreeing how the sale of ice should be handled through the appellee were attempting, simply, to provide an agency for the sale and distribution of the ice manufactured by the four companies in order to avoid the unnecessary expense of each company operating its own sales and distribution.

"Finding no reversible error the judgment of the trial court is affirmed."

Although, of course, the name applied by the parties to a relationship which they have created is not controlling, this case does indicate that it is sometimes important. Apparently if the four companies engaged in the manufacture of ice had, in their agreements with the cooperative which they organized, specified that the cooperative was to function on an agency basis, the State of Indiana would not have proceeded on the theory that gross income taxes should be paid by the cooperative.

For other cases which indicate that the fundamental relation between a cooperative and its members is one of agency, see "Legal Phases of Cooperative Associations, page 240.

Exemption -- Social Welfare Organizations

In the case of United States v. Pickwick Electric Membership Corporation, 158 F.2d 272, it appeared that:

> "The Appellee, Pickwick Electric Membership Corporation, filed this action in the District Court to recover internal revenue taxes, penalties and interest totaling $5,532.11 which it claimed were illegally assessed and collected for the fiscal years ending June 30, 1940 and June 30, 1941. Appellant appeals from a judgment in favor of the Appellee. The questions presented are (1) whether the taxpayer, during the taxable years in question, was exempt from payment of income taxes under § 101(8) or (10) of Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code, § 101(8, 10); and (2) whether the amounts collected by the taxpayer from its members during those years as 'amortization charges' to be used to pay interest and principal on long-term obligations, constituted taxable income or capital contributions."

The electric cooperative borrowed money from the Rural Electrification Administration with which to buy the electric distribution system of the Tennessee Electric Power Company for approximately $275,000. The electric cooperative originally was not formed as a cooperative but it was "duly converted into a cooperative, general welfare, non-profit membership corporation under Chapter 176 of the Public Acts of 1939, State of Tennessee * * *."

26 U.S.C. 101 reads in part as follows:

> "The following organizations shall be exempt from taxation under this chapter-- * * * *
>
> "(8) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes; ****

"(10) Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 per centum or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses; * * *." (Emphases added.)

The electric cooperative in the trial court and on appeal successfully contended that it was eligible for exemption under the terms of paragraph (8) quoted above, as an organization "not organized for profit but operated exclusively for the promotion of social welfare". The following quotations from the opinion of the appellate court show the basis for this conclusion:

"The members paid the amortization charges which were collected from them on an equitable basis and were segregated from all other revenues and held applicable exclusively to the payment of system indebtedness. The governmental agencies having principal control over the taxpayer's books considered the amortization charges as capital and not as income. The taxpayer did not return the amortization charges as income in its returns filed for the years ending June 30, 1940 and June 30, 1941.

"During the taxable years in question the rates charged non-member consumers were approximately the same as those charged by the private power companies whose transmission system had been acquired by the taxpayer until such non-member consumers became members of the cooperative. The rates paid by non-members during the taxable years were equal to, or higher than the rates charged to members, plus members' amortization charges. Amortization charges were not assessed against non-member consumers.

"During the taxable years in question the plaintiff complied with, and operated in accordance with, its by-laws, its contracts and agreements and the law of the State of Tennessee. Revenues from power sales, under the statute to which it owed its existence, received each fiscal year in excess of the amounts necessary to accomplish well-defined statutory purposes, among which were education in cooperation and the dissemination of information concerning the effective use of electric energy, and other information concerning the services made available by the taxpayer, were to be distributed to its members as, and in the manner, provided in the by-laws. Revenues in excess of those required for expenses and losses and statutory purposes were the property of members.

"The District Judge found as facts that the taxpayer was organized on a non-profit basis for the purpose of promoting the general welfare of the communities and citizenry served, and at all times during the taxable years in question was a general welfare corporation not organized for profit, and that the amortization charges were contributions to the capital of the taxpayer. He held as a matter of law that the taxpayer was a civic league or organization, not organized for profit but operated exclusively for the promotion

of social welfare and exempt from taxation for the years in question under § 101(8) of Internal Revenue Code; and that the amortization charges collected by the taxpayer for the years in question being contributions to capital were not taxable income.

* * * * * * *

"We agree with the ruling of the District Court that appellee is exempt under the provisions of § 101(8) quoted above, which makes it unnecessary to consider whether it also comes within the provisions of § 101(10) also quoted above. We do not agree with appellant's contention that since the appellee is a cooperative company within the general provisions of § 101(10) it can not seek exemption under § 101(8). The two exempt classifications are cumulative, not mutually exclusive. In order for the appellee to be exempt under § 101(8) the following three conditions must exist: (1) it must be a civic league or organization; (2) it must not be organized for profit, and (3) it must be operated exclusively for the promotion of social welfare. It is not necessary that its net earnings be devoted exclusively to charitable, educational or recreational purposes, as that provision of the subsection pertains only to local associations of employees, and is not applicable to civic leagues or organizations such as the appellee. Hanover Imp. Soc. v, Gagne, 1 Cir., 92 F.2d 888.

"No serious contention appears to be made that appellee is not a civic league or organization. 'Civic' is defined as pertaining to a city or a citizen; relating to the community. A civic league or organization embodies the idea of citizens of a community cooperating to promote the common good and general welfare of people of the community. It seems clear that appellee falls within such a classification. Garden Homes Co. v. Commissioner, 7 Circ., 64 F.2d 593, 599; Debs Memorial Radio Fund v. Commissioner, 2 Cir., 148 F.2d 948; 951; Amalgamated Housing Corporation v. Commissioner, 37 B.T.A. 817, 825 [affirmed on order, 2 Cir., 108 F.2d 1010].

"It seems also clear that the taxpayer was not organized for profit. The organizers were interested in rural electrification, electricity at a more reasonable rate than furnished by private power companies, and were not seeking a medium for investment of idle or available funds. The actual purpose is not controlled by the corporate form or by the commercial aspect of the business transacted, but may be shown by extrinsic evidence, including the by-laws and the method of operation. Debs Memorial Radio Fund v. Commissioner, supra. The trust indenture channeled excess earnings into debt retirement. The by-laws required surplus revenues after operating costs, payment on indebtedness and the establishment of reasonable reserves to be distributed to its members in the form of patronage refunds or general rate reductions, both methods of distribution directly furthering the original purpose of providing electricity at more reasonable rates. The power contract with the Tennessee Valley Authority also required ultimate excess revenues to be used for the reduction of rates. Such obligations and methods of operation completely

negative the usually accepted meaning of profit motive. It is true, as contended by the Government, that the taxpayer was organized and operated through its originally established rates for the purpose of collecting more revenue than required to meet its operating costs, required payments on indebtedness and establishment of reasonable reserves, and to that extent it was organized for the purpose of making a profit and actually made one. But whatever profit was made in that narrow sense of the word was only a tentative one and so closely related to a readjustment of rates that it was not an actual profit in the real meaning of the word over the longer period of time. It was sound business judgment to establish rates that would not result in an operating loss and the resulting margin of safety, allocated in advance to the cooperative purpose of the organization, is not the profit motive contemplated by the statute. Crooks v. Kansas City Hay Dealers Ass'n, 8 Cir., 37 F.2d 83; Hanover Imp. Soc. v. Gagne, supra; Debs Memorial Radio Fund v.Commissioner, supra. Nor do we think the fact that as a part of the overall plan electricity was also furnished to non-members at a profit which inured to the benefit of the members makes any material difference. It was a necessary incident in its development and purchase of operating facilities already dedicated to public use, and was not a part of the basic policy of the company. Non-members had the right to become members on non-discriminatory terms. Most of the non-member consumers acquired in 1939 when the company purchased the electric distribution system from the Tennessee Electric Power Company were eliminated as non-members by the close of the fiscal year ending June 30, 1941. As was said in Trinidad v. Sagrada Orden, 263 U.S. 578, at page 582, 44 S.Ct. 204, at page 206, 68 L.Ed. 458, 'That the transactions yield some profit is in the circumstances a negligible factor. Financial gain is not the end to which they are directed.'

"We also are of the opinion that the appellee was 'operated exclusively for the promotion of social welfare' within the meaning of the statute. Providing electricity at low cost to citizens of a community, in some instances where electricity was not available before, is promoting social welfare. Compare Helvering v. Davis, 301 U.S. 619, 672, 57 S.Ct. 904, 81 L.Ed. 1307, 109 A.L.R. 1319; Garden Homes Co. v. Commissioner, supra, 7 Cir., 64 F.2d 593, at page 599. The Government's contention is that it was not operated exclusively for that purpose in that its earned income inured to the benefit of its members in the form of patronage refunds or reduced rates. Patronage refunds are in substance an indirect form of reduced rates. It is pointed out that the members did not receive such returns in either the Hanover Imp. Soc. case or the Debs Memorial Radio Fund case. Reliance is placed upon Amalgamated Housing Corporation v. Commissioner, 2 Cir., 108 F.2d 294. But the ruling in both of the two last cited cases was that cash payments to persons who had invested substantial sums in the enterprise were dividends on stock instead of interest on indebtedness as claimed, and for that reason the company was organized for profit and not operated exclusively for the promotion of social welfare. In the present case there was no cash distribution, and the members,

paying only a nominal membership fee of five dollars were not investors. Benefits through the form of rate reductions are not dividends on investments any more than any other reduction in the cost of living can be called such. Such a benefit is the result of the successful promotion of social welfare by the company. The participation on the part of the members in the benefits of such social welfare does not mean that the operations are for their individual benefit instead of for the benefit of the community. In both the Hanover Imp. Soc. case and the Debs Memorial Radio Fund case, the stockholders shared in the beneficial results to the community from the social welfare work of the company. Non-members had the right to become members on a non-discriminatory basis and share alike in the benefits provided by the company. The fact that the members may receive some benefit on dissolution upon distribution of the assets is a contingency too remote to have any material bearing upon the question where the association is admittedly not a scheme to avoid taxation and its good faith and honesty of purpose is not challenged. Crooks v. Kansas City Hay Dealers Ass'n, supra, 8 Cir., 37 F.2d 83, at page 87." (Emphasis added.)

As shown above, the court held that the electric cooperative was exempt because it was one not organized for profit and because it was operated exclusively for the promotion of social welfare.

The opinion of the court is quite a sweeping one. The court specifically held that because paragraph (10) of Section 101 of 26 U.S.C. dealt with cooperatives that this did not operate to cause the electric cooperative to be ineligible for exemption under the terms of paragraph (8) of Section 101.

Under the theory of the opinion, apparently any organization "not organized for profit but operated exclusively for the promotion of social welfare" would be eligible for exemption under 101(8), although it might be argued that Congress may have intended that it would be exempt, if exempt at all, under one of the other eighteen paragraphs of 101. The court specifically held that the fact that some profit was made on non-member business did not adversely affect the claim of the association for exemption.

If a nonprofit electric cooperative is a social welfare organization, it would seem as though any other type of service organization could come within this classification. It might, for instance, be plausibly argued that a cold storage locker association or a purchasing association was included in this classification.

Installment Notes -- Holder in Due Course

In the case of Bliss v. California Co-op. Producers, ___ Cal. ___, 172 P.2d 62, it appeared that certain producers gave the cooperative association installment notes bearing no interest and which provided for

payments being made annually. The cooperative pledged the notes as security for the payment of a note for $5,000 in which the cooperative was maker and the plaintiffs were payees. Suit was brought on the pledged notes by the pledgees.

One installment on the pledged notes was past due "on their face at the time of transfer" and on account of this fact the lower court held that the plaintiffs were not holders in due course. On appeal to the Supreme Court of California that court said in part:

> "On the issue of whether or not the transferee of a negotiable installment note taken after the maturity of one or more but less than all of the installments, is a holder in due course, reference must first be made to the negotiable instruments law as embodied in our statutes: 'A holder in due course is a holder who has taken the instrument under the following conditions: (1) * * * (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; * * *.' Civ. Code, § 3133. 'The instrument is dishonored by nonpayment when-- (1) * * * (2) Presentment is excused and the instrument is overdue and unpaid.' Civ. Code, § 3164. The general rule has been stated repeatedly both under the negotiable instruments law and the common law that the transferee of an installment note is not a holder in due course as to any part of the note when the transfer has been made after the maturity of one or more but less than all of the installments. * * *
>
> "Some of the authorities heretofore cited appear to make pivotal the question of whether or not the case involved a situation where the installment had not in fact been paid at the time of the transfer. The argument being advanced that if the installment has in fact been paid, nothing appearing on the note to indicate one way or the other, the transferee may be a holder in due course although the note was indorsed to him after the due date of the installment specified on the face of the note. (In the instant case one of the issues presented is whether the installment had been paid when the notes were indorsed to plaintiffs, which involves the question of credits alleged to be owing to the makers-appellants from the payee-corporation when the installment fell due.) However, most of the authorities do not discuss or make a point of whether or not the installment has actually been paid and we believe the better rule to be that a transferee of an installment note which is transferred after the date fixed in the note for the payment of one or more installments is not a holder in due course as to any part of the note regardless of whether or not the past due installments have been paid. It most certainly would be true that he is not a holder in due course if the installment is unpaid and also if the note on its face showed that it was unpaid. The loss of defenses occurring where negotiable instruments are involved is a harsh one from the standpoint of the maker, and is justified only by the policy favoring facile commerce therein. The uniform negotiable instruments law and the law merchant before it are largely mechanical and highly technical rules of thumb and the essence of the various rules

involved is the appearance on the face of things--the surface view--the face of the note--etc. Extraneous and collateral matters are ignored. Therefore, we must look to the face of the instrument and when we find that the date has passed which is fixed by the instrument for its payment, no further inquiry need be made. It is past maturity paper and a transferee cannot be a holder in due course.

"The foregoing views are in harmony with the negotiable instruments law. It will be noted from the above quoted statute (Civ. Code, § 3133) that the holder to be a holder in due course must have taken the instrument before it was overdue and without notice of dishonor if it had been dishonored. We are here concerned only with the 'overdue' factor. It must mean overdue on its face, that is, the date fixed for the payment of an installment has passed. Hence it follows that appellants were entitled to urge against plaintiffs all defenses that would have been available if the transfer of the notes had been a mere assignment instead of a negotiation to a holder in due course of a negotiable instrument." (Underscoring added.)